Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No.: 80-676

IN THE

Supreme Court of the United States

October Term, 1980

GERALD L. SHARGEL, ATTORNEY ON BEHALF OF VINCENT ALOI,

Petitioner,

-against-

CHARLES E. FENTON, WARDEN OF THE FEDERAL PENITENTIARY AT LEWISBURG AS AGENT FOR THE STATE OF NEW YORK; AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 24, 1980

Questions Presented

Does *United States v. Apfelbaum*, 445 U.S. ____, 100 S.Ct. 948 (1980) apply to a case where the prosecution introduces at a perjury trial truthful immunized testimony which is *not relevant* to the *corpus delicti* of the perjury?

List of Parties

There are no parties in this action other than those named in the caption.

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No.:_____

IN THE

Supreme Court of the United States

October Term, 1980

GERALD L. SHARGEL, ATTORNEY ON BEHALF OF VINCENT ALOI,

Petitioner,

-against-

CHARLES E. FENTON, WARDEN OF THE FEDERAL PENITENTIARY AT LEWISBURG AS AGENT FOR THE STATE OF NEW YORK; AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Gerald L. Shargel, on behalf of Vincent Aloi, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit vacating its earlier judgment in *Shargel v. Lefkowitz*, 596 F.2d 42 (2d Cir. 1979) and directing that the District Court dismiss the petition for a writ of habeas corpus.

Opinion Below

The District Court opinion granting habeas corpus relief is reported in *Shargel v. Fenton*, 459 F.Supp. 700 (S.D.N.Y. 1978). The Second Circuit's opinion affirming that order is found in *Shargel v. Lefkowitz*, 596 F.2d 42 (2d Cir. 1979). The Court of Appeals' order vacating its earlier judgment and directing that the habeas petition be dismissed is unreported and appears in the appendix at page 1a.

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit vacating its earlier judgment and directing that the habeas corpus petition be dismissed is dated June 2, 1980. A timely petition for rehearing and hearing *en banc* was denied on August 25, 1980. A copy of the orders denying the petition for rehearing appears in the appendix hereto at page 3a. This court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

Constitutional Provisions Involved in the Case

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case

This petition marks the second occasion on which this case is before the Court. Earlier this year the Court granted the now respondent's petition for writ of certiorari and vacated the judgment of the Second Circuit Court of Appeals in *Shargel v. Lefkowitz*, 596 F.2d 42. *Attorney General of the State of New York v. Shargel*, ____ U.S. ____, 100 S.Ct. 1305 (1980). On remand the Court of Appeals vacated its earlier judgment and mandate and directed the District Court to dismiss the habeas petition in light of *United States v. Apfelbaum*, 445 U.S. ____, 100 S.Ct. 948 (1980). This petition for certiorari follows.

As noted by this Court in its memorandum decision the facts of this case appear in *Shargel v. Fenton*, 459 F.Supp. 700 and *Shargel v. Lefkowitz*, 596 F.2d 42. The facts are also set forth and discussed in the original petition for writ of certiorari and the then respondent's brief in opposition. For purposes of continuity and context, however, the facts will again be briefly stated.

On November 28, 1972, Vincent Aloi appeared, pursuant to subpoena, before a New York County Grand Jury which was investigating the murder of one Joseph Gallo. Upon his refusal to sign a waiver of immunity, Aloi automatically received transactional immunity pursuant to New York statute. CPL § 190.40.*

According to the Grand Jury Foreman, who appeared as a witness at Aloi's perjury trial, "several dozen" witnesses testified before the Grand Jury on

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*Section 50.10 of the New York Criminal Procedure Law defines the immunity conferred by section 190.40 as "transactional" immunity, rather than the more limited "use" immunity afforded by federal statute, 18 U.S.C. § 6002. See, *Kastigar v. United States*, 406 U.S. 441 (1972).

the subject of Gallo's death. (A 30-31)* These witnesses, the Foreman testified, "named certain individuals as the murderers of Mr. Gallo." (A 34) It was disclosed to the Grand Jury that a certain apartment in Nyack, New York had served as the nerve center of the conspiracy. (A 34) It was alleged by these witnesses that petitioner and others met at the apartment both before and after the Gallo murder. (A 34-36) In the Foreman's word:

> We were told by witnesses that the murder of Mr. Gallo had been plotted in this apartment and that it was used after the murder by individuals to try to cover up the murder and as a hang out. (A 35)

In his appearance before the Grand Jury, Aloi denied that he had ever been present at the Nyack apartment. (T 455-56) As a result of these denials and these denials alone, petitioner was indicted, tried and ultimately convicted of perjury. As pleaded in the indictment, petitioner

> ...swore falsely...that he, the defendant, never visited 101 Gedney Street, apartment LK, in Nyack, New York.
>
> Whereas, in truth and in fact as defendant well knew said testimony was false, and the truth was that the defendant visited 101 Gedney Street, apartment LK, in Nyack, New York.

Three witnesses were called by the prosecution to support its contention that Aloi had indeed visited the apartment. Yet this was not the prosecution's most potent proof. Over defense counsel's objection the prosecution was permitted to put into evidence virtually all of Aloi's immunized testimony before the Grand Jury. Except for a particular deletion regarding other subpoenas to which petitioner was then

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*The letter "A" refers to the joint appendix on file in the United States Court of Appeals for the Second Circuit.

subject (T 359-62), the entire testimony was read to the jury subject only to the court's instruction that the majority of it was relevant only to the issue of materiality. (A 50-53) As analyzed by the District Court judge who would later grant habeas relief:

> The minutes of petitioner's testimony before the grand jury constitute 90 pages of the trial record. Of that material, 59 pages, or nearly two-thirds of the minutes, relate to matters which appear altogether immaterial both to the alleged perjurious statement to developing the context in which the perjured testimony was given. Questions and answers concerning the nature of Aloi's business, how the business was run, where it was located, the dates during which Aloi worked, and the extent of income derived from it, formed the substance of this material. (Trial Transcript pages 378-437) An additional 18 pages of testimony concern matters only somewhat relevant to developing the context of the perjury, which at the same time are, however, quite incriminating in regards to petitioner's organized crime connections. Question[s] and answers here concerned the nature of petitioner's relationship with such individuals as Messrs. DiBiasi, Luperelli and Yacavelli (sic), and included such questions as (Transcript at 447), 'Do you know his nickname?' (Transcript at 437-455). Only 9 pages of the minutes contain questioning which is directly relevant to the issue of petitioner's presence in the Nyack apartment. (Transcript at 456-464.) 459 F.Supp. at 705-06 n.

Although the alleged act of perjury related to petitioner's singular assertion that he had never been to apartment LK at 101 Gedney Street, Nyack, New York, this topic, viewed liberally, was covered in some fifty-seven questions and answers before the Grand Jury. The prosecutor's tireless framing

and reframing of substantially the same question was met with petitioner's equally tireless denials with substantially the same answer. If the petit jury were to believe the People's witnesses, these fifty-seven questions clearly established the *corpus delicti* of the crime and would, therefore, have completed the People's *prima facie* case. These questions, of course, did not bear on the issue of materiality but, rather, went to the issue of petitioner's alleged false testimony.

On the question of materiality, pursuant to instructions of the trial court, the jury was allowed to consider some 502 additional questions and answers. The relevance of this other testimony to the question of materiality ranged from somewhat relevant to completely irrelevant. Interestingly, of these 502 other questions and answers, 335 related to petitioner's employment and business interests which had no conceivable relevance to the inquiry of the Grand Jury before which Aloi appeared. These pressing questions, during which the prosecutor verbally sparred with the witness, were introduced only to convince the petit jury that the defendant on trial before them was in reality, not a businessman but, rather, a gangster who would by his nature resort to perjury. Petitioner's contention has been that the introduction of the more than 300 questions and answers relating to other than the *corpus delicti* of the perjury was constitutional error.

Reasons for Granting the Writ

From the point that this immunized testimony was introduced at Aloi's trial he has made the claim that its introduction violated his Fifth Amendment right against self-incrimination. On direct appeal from his conviction and indeed upon the bringing of his original habeas corpus petition Aloi primarily relied upon an earlier Third Circuit decision in *United*

States v. Hockenberry, 474 F.2d 247 (3rd Cir. 1973) and this Court's decision in *Cameron v. United States*, 231 U.S. 710 (1914).

When habeas relief was finally granted by the District Court the Third Circuit had then recently decided *United States v. Apfelbaum*, 584 F.2d 1264 (3rd Cir. 1978) and that decision found a significant place in the Court's opinion. But of even more significance is the factual analysis made by the District Court. As noted in the statement of facts, the Court found that nearly two-thirds of Aloi's truthful immunized testimony before the Grand Jury was "altogether immaterial" to both the alleged perjury and to "developing the context in which the perjured testimony was given." There is therefore an immediate distinction to be made between this case and *Apfelbaum*. *Apfelbaum* dealth with truthful immunized testimony which was *relevant* to the *corpus delicti* of the perjury. In the instant case the truthful immunized testimony which petitioner focuses upon is, as the habeas court found, completely irrelevant or immaterial to the perjury. In short, petitioner contends that *Apfelbaum* should not be held to apply to this case and that it is the Fifth Amendment which prohibits the introduction of immunized testimony which is completely irrelevant to the perjury allegedly committed.

Most worthy of note is that the Second Circuit Court of Appeals, in its opinion affirming the District Court's granting habeas relief, did so *without* relying upon the Third Circuit's decision in *Apfelbaum*.

> We find it unnecessary to decide in this case whether the *Apfelbaum* more liberal standard should be applied to determine the extent to which Aloi's immunized testimony may be used to prove that he gave perjurious testimony in the same proceeding since, even under the more liberal *Cameron* standard, it was clearly improper to admit virtually all of his immunized grand jury testimony. 596 F.2d at 44.

The court also found that the immunized testimony had "*no probative value* in determining whether the alleged perjurious portion was intentionally false." (*Id.*) (Emphasis supplied)

The *Apfelbaum* case deals with a situation where, as earlier noted, the disputed testimony was relevant. This court concluded therefore that "...neither the immunity statute nor the Fifth Amendment preclude the use of respondent's immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence." 445 U.S. at ____ , 100 S.Ct. at 957-58. In the Aloi case, since the testimony was found by both the District Court and the Court of Appeals not to have been relevant, it is the Fifth Amendment which precludes introduction. *Cameron v. United States, supra.* Plainly stated, there is a constitutional shield which bars introduction of truthful immunized testimony which has no conceivable bearing on the prosecution's perjury case. Thus, where a state trial judge rules such testimony admissible, a clear constitutional violation results.

Both concurring opinions in *United States v. Apfelbaum* take issue with the expansive nature of the majority opinion. As stated by Mr. Justice Brennan:

> I do not think that the present result compels the conclusion that there are no special constitutional constraints on the use to which immunized testimony may be put in a perjury prosecution... 445 U.S. at ____ , 100 S.Ct. at 958

The instant case is worthy of this court's consideration because it may provide a useful counterpoint to *Apfelbaum* in showing that there are constitutional constraints upon the use of truthful immunized testimony.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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October 24, 1980

APPENDICES

Appendix A
Order of United States Court of Appeals

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of June, One Thousand Nine Hundred and Eighty.

Present: HONORABLE STERRY R. WATERMAN,
HONORABLE WALTER R. MANSFIELD,
HONORABLE WILLIAM H. TIMBERS,
Circuit Judges.

Docket No. 78-2143

GERALD L. SHARGEL, Attorney in Behalf of Vincent Aloi,

Petitioner-Appellee,

-against-

CHARLES E. FENTON, Warden of the Federal Penitentiary at Lewisburg, etc., et al.,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondent-Appellant.

Appendix A
Order of United States Court of Appeals

The action herein having been taken to the Supreme Court of the United States by writ of certiorari and a certified copy of the judgment of the said Court having been received and filed vacating with costs the judgment of this court and remanding the said action to this court for consideration in light of *United States v. Apfelbaum*, 445 U.S. ____ (1980).

UPON CONSIDERATION THEREOF, it is

ORDERED, that the judgment of this court of March 13, 1979, and the mandate issued thereunder be and they hereby are vacated and that the case is remanded to the district court with directions to vacate its judgment and to dismiss the petition for a writ of habeas corpus in light of *Apfelbaum*.

/s/ _____
Sterry R. Waterman, U.S.C.J.

/s/ _____
Walter R. Mansfield, U.S.C.J.

/s/ _____
William H. Timbers, U.S.C.J.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Hearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of August, one thousand nine hundred and eighty.

78-2143

GERALD L. SHARGEL, Attorney in behalf of Vincent Aloi,

Petitioner-Appellee,

-against-

CHARLES E. FENTON, Warden of the Federal Penitentiary at Lewisburg, etc., et al.,

Respondents,

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondent-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by petitioner-appellee Gerald L. Shargel, Attorney in behalf of Vincent Aloi, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Hearing En Banc

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ _____
Wilfred Feinberg
Chief Judge

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Hearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of August, one thousand nine hundred and eighty.

Present: HON. STERRY R. WATERMAN
HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
Circuit Judges.

78-2143

Gerald L. Shargel, Attorney in behalf of Vincent Aloi,
Petitioner-Appellee.

v.

Charles E. Fenton, Warden of the Federal Penitentiary at Lewisburg, as Agent for the state of New York; and Louis J. Lefkowitz, Attorney General of the State of New York,
Respondents,

Louis J. Lefkowitz, Attorney General of the State of New York,
Respondent-Appellant.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Hearing En Banc

A petition for a rehearing having been filed herein by counsel for the Petitioner-appellee, Gerald L. Shargel,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ _____

A. Daniel Fusaro
Clerk

by Rolanne Henry
Deputy Clerk

No. 80-676

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Supreme Court of the United States

October Term, 1980

GERALD L. SHARGEL, Attorney on behalf of VINCENT ALOI,

Petitioner,

against

CHARLES E. FENTON, Warden of the Federal Penitentiary of Lewisburg as agent for the State of New York; and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

In *United States* v. *Apfelbaum*, 445 U.S. 115 (1980), this Court held that there was no violation of the Fifth Amendment's privilege against self-incrimination by the introduction of a defendant's immunized truthful grand jury testimony at his perjury trial. The Court noted that the introduction of such evidence was limited only by any applicable evidentiary rules.

The question presented by this case is whether a state judge erroneously ruled that a defendant's immunized truthful grand jury testimony was relevant and admissible at his perjury trial, and, if the ruling was erroneous, whether the introduction of that immunized testimony violated the privilege against self-incrimination?

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GERALD L. SHARGEL, Attorney on behalf of VINCENT ALOI,

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against

CHARLES E. FENTON, Warden of the Federal Penitentiary of Lewisburg as agent for the State of New York; and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This is the second petition for certiorari in this case. The State first sought certiorari from a judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the District Court granting a writ of habeas corpus to state prisoner Vincent Aloi. This Court granted certiorari (445 U.S. 922) and summarily vacated the judgment and remanded to the Second Circuit for

further consideration in light of *United States* v. *Apfelbaum*, 445 U.S. 115 (1980). Upon remand, the Second Circuit vacated its earlier judgment and directed the District Court to dismiss the petition. A petition for rehearing and hearing en banc was denied on August 25, 1980. Aloi now seeks a writ of certiorari to review the judgment of the Second Circuit which directed dismissal of the habeas corpus petition.*

Statement of the Case

Introduction

This controversy arises over Aloi's attempt to set aside his August 7, 1973 New York State conviction for PERJURY IN THE FIRST DEGREE (New York Penal Law § 210.15) by seeking a writ of habeas corpus. Aloi's conviction arose from his false testimony before a New York County grand jury which was investigating the murder of reputed organized crime figure Joey Gallo. Aloi received an indeterminate sentence of from two and one-third to seven years imprisonment for his offense.

The State Court Proceedings

A. The Grand Jury Investigation

In 1972, a New York County grand jury was investigating the killing of reputed organized crime figure Joey Gallo in a downtown Manhattan restaurant on April 7, 1972. The grand jury heard evidence that certain individ-

* Aloi was enlarged on bail until September 26, 1980 when the Second Circuit denied his motion to stay the mandate pending this petition for certiorari. On September 29, Aloi surrendered in New York Supreme Court. Aloi is presently incarcerated in Ossining Correctional Facility, Ossining, New York.

uals had used an apartment in Nyack, New York as a meeting place for planning Gallo's murder and for attempting to conceal the identity of the perpetrators after the murder was committed. The grand jury also heard evidence that Vincent Aloi had been present at several of the meetings in the apartment (T. 334-336).*

Aloi appeared before the grand jury, pursuant to a subpoena, on November 28, 1972. Under New York law, Aloi received automatic transactional immunity from prosecution for his testimony. New York Criminal Procedure Law §§ 50.10(1), 190.40. His immunity did not extend, however, to a prosecution for perjury. New York Criminal Procedure Law § 50.10(1).

Aloi testified before the grand jury that he had never been to the apartment in Nyack, New York. Despite the fact that the apartment in question was called to Aloi's attention in various ways, he repeatedly denied ever visiting that apartment (T. 456-462).

Subsequently, Aloi was indicted for Perjury in the First Degree for falsely swearing that he had never been to the Nyack apartment used to plan Gallo's murder.

B. The Trial

At trial, two Federal Bureau of Investigation agents testified that they had observed Aloi enter the Nyack apartment eleven days after Gallo was murdered. Another witness, Joseph Luperelli, who had been involved in the killing of Gallo, testified that Aloi had been to the apartment on

* Page references preceded by "T." are to the trial minutes

several occasions both before and after the murder (T. 121-123, 190-191, 231-233, 273, 485-488, 525-526).

When the prosecutor sought to introduce Aloi's grand jury testimony, defense counsel objected to the admission of any of the grand jury testimony other than the portion charged in the indictment to be perjurious. The trial judge overruled that objection, but invited defense counsel to object to particular statements made by Aloi before the grand jury which the defense counsel considered prejudicial (T. 349-354). Defense counsel, however, refused to request deletion of specific items in the grand jury minutes. The judge himself then suggested deletion of some material (T. 357, 359-360), and finally directed defense counsel to review the grand jury minutes and present any objections he had to specific statements (T. 358-360). Defense counsel still did not ask to have particular statements deleted (T. 360-361), except for one request which was granted (T. 363-364).

The trial judge admitted the remainder of Aloi's grand jury testimony and instructed the jury that the grand jury testimony was not to be considered "for its truth" but solely to show what had transpired before the grand jury. He further cautioned the jurors that the record of Aloi's grand jury appearance, apart from the statements concerning the Nyack apartment, could be considered only for its bearing on the issues of materiality* and Aloi's state of mind in making the statements charged to be perjurious (T. 332, 362-363, 642-643, 652-653).

* Under New York law, the issue of materiality is an issue for the jury to determine. *See People* v. *Ianniello,* 36 N.Y.2d 137, 143-144 (1975).

Aloi's conviction for perjury was unanimously affirmed by a June 11, 1974 order of the Appellate Division, First Department, of the New York Supreme Court. 76 A.D.2d 806. On July 10, 1974, and again on September 10, 1974, after reargument, leave to appeal to the New York Court of Appeals was denied.

The Federal Court Proceedings

On October 13, 1978, the District Court for the Southern District of New York granted a writ of habeas corpus on Aloi's claim that his privilege against self-incrimination had been violated by the admission at trial of more than "*minimal relevant* and *essential* other testimony necessary to place the alleged perjury in its proper context." 459 F. Supp. 700, 705 (S.D.N.Y. 1978) (emphasis in original). The District Court also rejected the State's contention that the introduction of the record of Aloi's grand jury appearance was, if error, harmless. *Id.* at 707.

The United States Court of Appeals for the Second Circuit affirmed the order granting the writ. 596 F.2d 42 (2d Cir. 1979). As stated above, however, this Court granted certiorari and remanded the case and the Second Circuit reversed its position and directed dismissal of the petition.

ARGUMENT

No substantial question is presented by the introduction of portions of Aloi's immunized grand jury testimony at his subsequent trial for perjury which the state courts concluded were admissible under state evidentiary rules.

Aloi claims that his Fifth Amendment privilege against self-incrimination was violated by the admission of allegedly irrelevant portions of his immunized grand jury testimony at his perjury trial. This claim raises no substantial federal question for this Court to review.

This Court's recent opinion in *United States* v. *Apfelbaum,* 445 U.S. 115 (1980) is dispositive of Aloi's constitutional claim. In *Apfelbaum,* this Court held that the Fifth Amendment did not bar the admission of immunized grand jury testimony at a subsequent prosecution for perjury based upon perjury committed before the grand jury. The Court recognized that such grand jury testimony would, of course, still be subject to applicable state evidentiary rules. 445 U.S. at 131-132.

Aloi argues that the opinion in *Apfelbaum* should be read to mean that the privilege against self-incrimination permits introduction of truthful immunized grand jury testimony at a perjury trial only if that testimony conforms to the applicable rules of evidence. Consequently, if the testimony is inadmissible, then its introduction would violate not only the rules of evidence but the privilege as well. The logic of this argument would mean that the scope of the privilege against self-incrimination would vary depending

upon the state in which the immunized testimony is offered at trial. The difficulty with such an argument is that it is seemingly inconsistent with the Court's recognition in *Apfelbaum* that the exception to the Fifth Amendment privilege permitting the introduction of immunized grand jury testimony is a "complete" one. 445 U.S. at 131-132.

Any other view of *Apfelbaum* would require this Court to determine the scope of the Fifth Amendment privilege by undertaking to examine the evidentiary rules relating to relevance in each state. In short, the Court would be required to engage in the development of evidentiary rules, a role this Court has traditionally refrained from doing, especially in the case of state-created crimes. *See Spencer* v. *Texas,* 385 U.S. 554, 562, 564, 568-569 (1967). Even to the extent that this Court might engage in such a role under certain circumstances, for example, where a state's evidentiary rules prevent a defendant from presenting evidence critical to his defense, *Chambers* v. *Mississippi,* 410 U.S. 284 (1973), this case presents no such situation.

There is still another reason why this case is not an appropriate one to review a state court's evidentiary ruling. It is not an appropriate case because even assuming the arguability of Aloi's novel approach to the scope of the complete exception recognized in *Apfelbaum,* that case is but a few months old. Accordingly, until the issue has been explored by the various federal and state courts, there is little reason to decide it at this time.

Still further militating against review is the fact that the only issue here is whether particular questions and

answers before a grand jury investigating the killing of an organized crime figure were relevant and admissible in a state perjury prosecution against Aloi for lying to that grand jury. The Court is being asked essentially to review whether evidence which both the New York courts* and the Second Circuit,** upon remand, concluded was properly introduced at trial conformed to the rules of evidence. The propriety of an evidentiary ruling hardly seems like the kind of issue calling for a grant of certiorari.

In addition, this Court would have to resolve an evidentiary question even though defense counsel, at trial, failed to raise specific grounds in challenging the admission of the nonperjurious grand jury testimony. Indeed, defense counsel persisted in making only a blanket objection (except as to one request for deletion which was granted) even though the trial judge directed him to make specific objections to the testimony he wanted omitted. Given this posture, there is no reason to review the merits of objections not made at trial. *See Hill* v. *California*, 401 U.S. 797, 805-806 (1972); *Johnson* v. *United States*, 318 U.S. 189, 201 (1943); *see also Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

In sum, the question of whether the evidence in this particular state prosecution was properly admitted simply

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* Significantly, the New York courts have not been hesitant to reverse convictions where they have found irrelevant prejudicial grand jury testimony admitted into evidence. *See People* v. *McGrath*, 46 N.Y.2d 12, 32 (1978).

** Since the Second Circuit evidently concluded that the evidence was properly admitted under New York law, Aloi can find little solace in his reliance on the District Court and Second Circuit opinions, prior to the *Apfelbaum* decision, which suggest that the introduced testimony was not relevant (Pet. A. 7-8).

does not present a substantial federal question, especially in light of defense counsel's failure to make specific trial objections to the now challenged evidence.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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